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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,

Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,

Cross-Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF CROSS-PETITIONERS AMERICAN TRUCKING ASSOCIATIONS, INC., CHAMBER OF COMMERCE OF THE UNITED STATES, *ET AL.**

ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for Cross-Petitioner Chamber of Commerce of the United States

EDWARD W. WARREN
Counsel of Record
ROBERT R. GASAWAY
JEFFREY B. CLARK
DARYL JOSEFFER
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Counsel for Cross-Petitioners American Trucking Associations, Inc. and Chamber of Commerce of the United States

*Additional Parties and Counsel Listed on Inside Cover

April 25, 2000

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BETH L. LAW
ROBERT S. DIGGES
ATA LITIGATION CENTER
2200 Mill Road
Alexandria, VA 22314
Counsel for American Trucking Associations, Inc., Burns Motor Freight, Inc., Garner Trucking, Inc., and Genie Trucking Line, Inc.

JAN S. AMUNDSON
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Counsel for National Association of Manufacturers

GARY H. BAISE
ELIZABETH S. POLINER
BAISE, MILLER & FREER, P.C.
1020 19th Street, N.W.
Suite 400
Washington, D.C. 20036
Counsel for Equipment Manufacturers Institute

DIMETRIA G. (JIM) DASKAL
THE DASKAL LAW GROUP
3 Church Circle
Suite 500
Annapolis, MD 21401
Counsel for National Coalition of Petroleum Retailers

DAVID M. FRIEDLAND
BEVERIDGE & DIAMOND
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005
Counsel for National Small Business United, The American Portland Cement Alliance, and The Glouster Company, Inc.

DOUGLAS I. GREENHAUS
NATIONAL AUTOMOBILE DEALERS ASSOCIATION
8400 Westpark Drive
McLean, VA 22102
Counsel for National Automobile Dealers Association

ERIKA Z. JONES
TIMOTHY S. BISHOP
ADAM C. SLOANE
MAYER, BROWN & PLATT
1909 K Street, N.W.
Washington, D.C. 20006
Counsel for American Farm Bureau Federation

JEFFREY L. LEITER
CHET M. THOMPSON
COLLIER, SHANNON, RILL & SCOTT
3050 K Street, N.W., Suite 400
Washington, D.C. 20007
Counsel for Non-Ferrous Founders' Society

ROBERT R. GASAWAY
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
Counsel for American Road and Transportation Builders Association

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INTRODUCTION

ATA has defended, and will continue to defend, the decision below "on its own terms." *Compare* U.S. Reply 3 *with* ATA Resp. 11-15, ATA Cross-Pet. 7-14. But ATA's cross-petition also shows that the court below invalidated EPA's statutory interpretation on nondelegation grounds primarily because *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), precluded any consideration of the non-health factors that would allow EPA to "'speak to the issue of degree'" in standard-setting. *See* ATA Cross-Pet. 4, 7-12. Logically then, this Court might uphold the D.C. Circuit judgment *overruling* EPA without considering *Lead Industries*. Yet, it cannot *sustain* EPA's interpretation of the Clean Air Act ("CAA" or "Act"), or the regulations based on it, without considering *Lead Industries* and holding that it was correctly decided. *See id.* at 1, 14-26.

EPA's Opposition is dismissive of this logically undeniable point, saying that the decision below and *Lead Industries* are intertwined "only in the haphazard sense that a fishing line might become intertwined with a tree limb." U.S. Opp. 18. According to EPA, this Court need only "correct" the D.C. Circuit's "basic conceptual error" of invoking the nondelegation doctrine as the basis for its decision. *Id.* at 19. EPA leaves the impression that it is mainly this doctrinal issue that is of importance – and that the decision below would have been more acceptable had the D.C. Circuit only ruled against EPA on *Chevron I* grounds (as this Court did against the FDA in *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1305 (2000), or held EPA's interpretation "unreasonable" under *Chevron II* (as in *AT&T Corp. v. Iowa Utilities*, 525 U.S. 366, 397-98 (1999)).

But this Court's job is to review holdings, not to provide advisory opinions on what EPA terms "conceptual errors." As this Reply demonstrates, the court of appeals reversed on the grounds that it did only because the most obvious options available for use as "intelligible principles" – "cost-benefit analysis," as well the "significant risk" test embraced by this Court in *Industrial Union Department, AFL-CIO v. American*

Petroleum Institute, 448 U.S. 607 (1980) ("*Benzene*") – were ruled out by *Lead Industries*. It is therefore entirely artificial to suggest, as EPA does, that the nondelegation issue can somehow be divorced from the enterprise of statutory interpretation and considered in isolation. *See* U.S. App. 14a.

Moreover, as demonstrated below, the *Lead Industries* issue – whether the Act absolutely precludes any consideration of non-health factors in standard-setting – is plainly worthy of *certiorari* in its own right. Not even EPA can deny that decision's importance, nor seriously defend its reasoning. In particular, *Lead Industries* cannot survive the first step of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (under which EPA acknowledges it must be defended), given the non-exclusionary statutory text and the interpretative norm recently reiterated by the D.C. Circuit, that "only where there is '*clear congressional intent to preclude consideration of cost*'" will courts find agencies "barred from considering costs." *See Michigan v. EPA*, No. 98-1497, 2000 WL 180650, at *12 (D.C. Cir. Mar. 3, 2000) ("*State of Michigan*") (emphasis added), *pet'ns for reh'g filed* (4/20/2000). *See* Part I below.

Just as *Lead Industries* is inevitably bound up in the D.C. Circuit's nondelegation holding, so too any statutory interpretation of the Act's standard-setting provisions by this Court must be keenly sensitive to nondelegation concerns. The nature and extent of Congress' delegation of authority to an agency has always figured prominently in statutory construction, whether that consideration is invoked expressly, as in this Court's *Benzene* decision, or implicitly, as in *Iowa Utilities* and other recent decisions. The importance of nondelegation concerns, expressed both as construction canons and as part of the construction of the Act itself, will therefore continue should this Court accept review of any form of the Government's first question presented. In that event, this Court's essential task would be to decide whether, contrary to

Lead Industries, consideration of non-health factors in EPA standard-setting is warranted. *See* Part II below.

I. *LEAD INDUSTRIES* IS BOTH CLOSELY TIED TO THE DECISION BELOW AND WORTHY OF *CERTIORARI* IN ITS OWN RIGHT.

EPA's Opposition claims that this cross-petition raises "unrelated issues involving particular details of the underlying rulemakings." U.S. Opp. 2. It describes as sheer "fantasy" any notion that "'the court below was forced to consider constitutional nondelegation issues because that court had misconstrued the Clean Air Act in *Lead Industries* and subsequent cases.'" *Id.* at 20 (quoting ATA Cross-Pet. 5). But one need look no farther than the court of appeals' opinion itself to confirm the central role *Lead Industries* played in producing the nondelegation holding below.

The D.C. Circuit faulted EPA's interpretation of the Act's standard-setting provisions because of that interpretation's failure to "speak to the issue of degree," or provide a "cut-off point." U.S. App. 5a, 7a. As the means to correct that flaw, the court then asked: "What sorts of 'intelligible principles' might EPA adopt? Cost-benefit analysis, mentioned as a possibility in [*International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. OSHA*, 938 F.2d 1310, 1319-21 (D.C. Cir. 1991) ("*Lockout/Tagout I*")], is not available under decisions of this court. Our cases read [CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1)] as barring EPA from considering any factor other than 'health effects relating to pollutants in the air.'" U.S. App. 14a-15a (citing *Lead Industries* and progeny).

The court went on to suggest that EPA might develop "the rough equivalent of a generic unit of harm that takes into account population affected, severity, and probability" – somewhat akin to the "significant risk" test adopted by this Court in *Benzene*. *Id.* at 16a. But even so, the court acknowledged that similar approaches devised under the

Medicaid program employed an indirect cost analysis in order to allocate health resources over a range of different medical conditions. *Id.* at 17a-18a. If this indirect consideration of costs could not be avoided, the court suggested, the *Lead Industries* straightjacket might force EPA to "report to the Congress . . . and seek legislation ratifying its choice." *Id.* at 18a. In short, the D.C. Circuit hoped that EPA could develop an "intelligible principle," but admitted that, because of *Lead Industries*, the success of that venture was not entirely assured.

That *Lead Industries* effectively led to the nondelegation holding in this case is further underscored by the D.C. Circuit's discussion of the very similar problem in *Lockout/Tagout I*. There, the court rejected the Department of Labor's interpretation of the OSH Act based on a nondelegation analysis nearly identical to the one below. As *Lockout/Tagout I* explains, cost-benefit analysis is merely a shorthand for rational decisionmaking in everyday life – or "what Benjamin Franklin referred to as a 'moral or prudential algebra.'" 938 F.2d at 1321. As so defined, "cost-benefit analysis entails only a systematic weighing of pros and cons," *id.* – a traditional form of reasoned decisionmaking, the absence of which ATA maintains would raise nondelegation and other concerns, especially unless expressly ruled out by Congress. While this was "a permissible interpretation" in *Lockout/Tagout, id.*, *Lead Industries* interprets Section 109(b) to preclude it here, thus requiring resort to alternative intelligible principles along the lines suggested by the decision below. *See* U.S. App. 14a-18a.

Rather than grapple with the obvious barrier that *Lead Industries* poses for resolving the appellate court's very real nondelegation concerns, EPA and the other cross-respondents pretend that this Court might somehow grant *certiorari* but still avoid any inquiry into statutory construction, supposedly because ATA concedes that the Act is "undisputably" constitutional. *See* ALA Opp. 3; U.S. Opp. 18-19. To be sure, ATA, like the court below, accepts that the Act is constitutional, provided it is *construed* in a manner that imposes

real limits on agency discretion, promotes rational decisionmaking, and permits meaningful judicial review. Needless to say, this so-called concession hardly amounts to "recharacteriz[ing] the court of appeals' decision in ways that obfuscate the issues." U.S. Opp. 5. The court of appeals could not have been clearer that it was invalidating "*the construction* of the Clean Air Act on which EPA relied in promulgating the NAAQS at issue." U.S. App. 4a (emphasis added). In this regard, it expressly relied on *Benzene* as an example of how the need to defuse nondelegation concerns could give rise to a statutory *construction* providing the missing "*intelligible principle*" – a principle that, under *Chevron*, it is the agency's job to develop in the first instance. *See, e.g., id.* at 5a; 75a-76a.

Viewed from this perspective, *Lead Industries* might well preclude the very sort of bounded and rational decisionmaking necessary for EPA to solve the appellate court's nondelegation concerns – surely the best possible reason for granting ATA's cross-petition. But EPA is equally wrong to suggest that *Lead Industries* "raise[s] no issue that would independently warrant review." U.S. Opp. 5. *Lead Industries* on its own terms squarely poses the question whether EPA may (or even must) impose countless billions of dollars in economic costs without regard to whether those costs, in total or at the margin: (1) address "significant" health risks as that test has been applied by agencies since *Benzene*; (2) are necessary to provide an "adequate" "margin of safety," *cf. NRDC v. EPA*, 824 F.2d 1146, 1158 (D.C. Cir. 1987) (*en banc*) ("*Vinyl Chloride*"); or (3) are even roughly commensurate with the predicted health benefits, *see generally Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991). *See* ATA Cross-Pet. i, 22-26.

These interrelated issues are of manifest importance in their own right and are therefore independently worthy of *certiorari*. *Cf.* Sup. Ct. R. 10. Indeed, this Court granted *certiorari* on analogous questions in the much less economically significant context of the OSH Act. *See American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981); *Benzene*. As the Court,

speaking through Justice Brennan, explained, *certiorari* was granted in *American Textile* expressly "to resolve th[e] important question" of whether an agency must "enact the most protective standard possible to eliminate a significant risk of material health impairment," or must instead choose a standard that "reflects a reasonable relationship between the costs and benefits associated with the Standard." 452 U.S. at 494-95.

EPA's only response to this obvious, albeit alternative, ground for granting ATA's cross-petition boils down to the claim that *Lead Industries* was correctly decided. *See* U.S. Opp. 9-16. But even EPA must concede that *Lead Industries*, although decided before *Chevron*, speaks in mandatory terms that can only be defended under *Chevron* step one. *Id.* at 9; U.S. App. 19a ("[T]he *Lead Industries* decision was made in *Chevron* step one terms"). Under a *Chevron* step-one test, however, it is barely plausible to argue that Congress "has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. To the contrary, the non-exclusionary Clean Air Act text – "protect the public health" with "an adequate margin of safety" – permits various readings, including many allowing consideration of the non-health factors that are now precluded from consideration by *Lead Industries* and its progeny.

Significantly, EPA's Opposition omits any mention of *State of Michigan*, which strongly suggests how the D.C. Circuit might construe CAA § 109(b)'s open-ended text if it – like this Court – were free to interpret the Act afresh. *State of Michigan* involved a pollution-transport provision that prohibits emission of "any air pollutant in amounts which will . . . contribute significantly" to nonattainment of the national standards. CAA § 110(a)(2)(D)(i), 42 U.S.C.§ 7410(a)(2)(D)(i). Confronted with this statute, the court ruled: "It is only where there is 'clear congressional intent to preclude consideration of cost' that we find agencies barred from considering costs." *Id.* at *12 (quoting *Vinyl Chloride*, 824 F.2d at 1163; citing additional cases). From this, the court went on to express the "general view that preclusion of cost consideration requires a rather express congressional direction." *Id.* (citing authorities).

Applying that canon, *State of Michigan* explained that the provision before it, like other provisions interpreted in previous cases, involves "[a] mandate directed to some environmental benefit . . . phrased in general quantitative terms ('ample margin of safety,' 'substantial restoration,' and 'major'), and contains not a word alluding to non-health tradeoffs." 2000 WL 180650, at *12 (discussing, *inter alia*, *NRDC v. EPA*, 937 F.2d 641, 643-46 (D.C. Cir. 1991); *Vinyl Chloride*, 824 F.2d at 1163). "[I]n each case we found that in making its judgments of degree the agency was free to consider the costs of demanding higher levels of environmental benefit. So too here." *Id.* *State of Michigan* thus confirms in the strongest possible terms that, notwithstanding what EPA says, *see* U.S. Opp. 8, the D.C. Circuit does indeed "lack confidence" in the reasoning of *Lead Industries*.

Equally telling, however, is the complete absence of any EPA response to ATA's extended textual and structural deconstruction of the *Lead Industries* holding. *See* ATA Cross-Pet. 18-22. EPA thus makes no mention at all of statutory text except for mistakenly arguing that "Section 108(a)(2) . . . *limits* the kind of information to be included in the 'criteria' to 'the latest scientific knowledge' about effects on health and welfare 'which may be expected from the presence of such pollutant in the ambient air.'" U.S. Opp. 10 (emphasis added). In fact, as ATA's cross-petition demonstrates, there is no such limitation. Rather, the statute merely specifies certain items that are to be included in an analytical criteria *document* without in any way *limiting* the analysis to those items. *See* ATA Cross-Pet. 19-20.

EPA's heavy reliance on *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), only confirms this latter point. *See, e.g.*, U.S. Opp. 11-12. The statutory provision at issue there, in marked contrast to Section 108, specifically states that EPA "shall" approve a State Implementation Plan so long as eight specific requirements are satisfied. *See* CAA § 110(a)(2), 42 U.S.C. § 7410(a)(2). That list of decisional criteria, combined with the mandatory "shall," makes clear that the statutory list is intended as exclusive. But as the D.C. Circuit has ruled, *Union Electric*

has no relevance where, as here, Congress has not "limit[ed] specifically the factors the Administrator may consider." *Vinyl Chloride*, 824 F.2d at 1158.

EPA's final claim, that Congress somehow ratified the *Lead Industries* interpretation in the 1977 and 1990 amendments to the Act, is even more unpersuasive than EPA's other weak arguments, since EPA itself concedes that Congress did not amend the relevant statutory provisions in any respect. *See* U.S. Opp. 14 ("Congress did not change the substantive criteria for setting and revising NAAQS" in 1977); *id.* at 15 ("Congress . . . did not change the legal standard on which NAAQS are based" in 1990). As the D.C. Circuit has already held respecting the 1977 amendments, "we certainly cannot construe Congress' failure to act in these circumstances as amounting to ratification," since Congressional inaction can result from any number of causes. *Vinyl Chloride*, 824 F.2d at 1162 & n.10. *Compare Brown & Williamson*, 120 S. Ct. at 1305 (ratification argument made where, unlike here, Congress affirmatively took "incompatible" action).

In the end, the most that EPA could (but does not) say is that *State of Michigan* fails to mention *Lead Industries* at all, confirming that, whatever its merits, the D.C. Circuit "has long viewed the matter as settled." U.S. Opp. 8-9. The D.C. Circuit may indeed be willing to treat *Lead Industries* as a precedential leper – diseased but untouchable – especially given the resources it has devoted to the issue over the years. *See, e.g, Vinyl Chloride*, 824 F.2d at 1158-59. But the fact remains that leaving *Lead Industries* uncorrected makes vastly more difficult EPA's task of solving the nondelegation problem that drove the decision below. For that reason, as well as because *Lead Industries* is surpassingly important and wrongly decided, this Court should grant ATA's cross-petition.

II. NONDELEGATION CONCERNS SHOULD CONTINUE TO INFLUENCE CONSTRUCTION OF THE ACT IF *CERTIORARI* IS GRANTED.

EPA is plainly wrong to argue that *Lead Industries* bears no relationship to the appellate court's nondelegation holding. But it would be equally wrong to assume that this Court, although not constrained by *Lead Industries*, could construe Section 109(b) without regard to nondelegation concerns.

EPA unabashedly admitted below that it followed "no generalized paradigm," that its decision "may not be amenable to quantification in terms of what risk is 'acceptable' *or any other metric*," and that it was "largely judgmental in nature." 62 Fed. Reg. 38,856, 38,883 (July 18, 1997) (emphasis added). Faced with similarly aggressive agency interpretations, this Court has never hesitated to deploy the nondelegation canon and like considerations in order to reject agency statutory constructions that leave to agencies unbounded authority to shape regulatory programs in ways that Congress would not have reasonably expected. *Cf. Brown & Williamson*, 120 S. Ct. at 1314 ("In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."); *Department of Commerce v. House of Representatives*, 525 U.S. 316, 343 (1999) (rejecting argument that Congress "would have decided to reverse course on [sampling for census purposes] by enacting only a subtle change in phraseology"); *MCI Telecommunications Corp. v. AT&T Corp.*, 512 U.S. 218, 221 (1994) (rejecting FCC interpretation of the term "modify" as permitting the FCC effectively to abolish all tariff-filing requirements). Along these very lines, just last term in *Iowa Utilities*, this Court used statutory interpretation doctrines to reject an agency construction that would otherwise have resulted in unbounded agency discretion. *See* 525 U.S. at 386-90; Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1431-42 (2000) (treating *Iowa Utilities* and *ATA* as examples of the "new delegation doctrine").

Moreover, in *Benzene*, this Court rejected on nondelegation grounds an OSHA interpretation of a standard-setting statute that, as even EPA admits, contains an express "feasibility" limitation. U.S. Opp. 16. Notwithstanding that feasibility limitation, this Court used the nondelegation canon to reject OSHA's interpretation on grounds that it would grant OSHA "unprecedented power over American industry" to "impose enormous costs that might produce little, if any, benefit." 448 U.S. at 645. Here, the Act lacks any such limitation. Deployment of the nondelegation canon is therefore all the more necessary, lest EPA be granted even greater discretion to impose costs that are orders of magnitude higher – or as the court below put it, unbounded discretion to "send industry not just to the brink of ruin but hurtling over it." U.S. App. 12a.

As ATA will demonstrate should this Court accept review, this boundless authority EPA claims would contradict not only the statutory text, but also basic notions of the agency's proper role, as reflected in foundational constitutional and administrative law principles. Under these principles, as confirmed by the holding of the *State of Michigan* case, consideration of non-health factors is the norm in interpreting public health provisions, absent "clear congressional intent" to the contrary. *See* 2000 WL 180650, at *12. Indeed, EPA itself admitted as much in its *State of Michigan* brief: "[W]here, as here, the statute is silent regarding the factors EPA may or may not consider, it is generally permissible for the Agency to consider other relevant factors," such as costs. EPA Br. at 53 in *State of Michigan v. EPA*, No. 98-1497 (D.C. Cir.). Unless and until Congress amends the Act, consideration of non-health factors is warranted, just as EPA argued it was in *State of Michigan*.

CONCLUSION

EPA's complete silence concerning whether this cross-petition is necessary apparently signals its agreement that a cross-petition is not needed to preserve the *Lead Industries* issue. *See* ATA Cross-Pet. 27-30. Nevertheless, ATA urges that the cross-petition be granted or held for the reasons stated above.

Respectfully submitted,

ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for Chamber of Commerce of the United States

EDWARD W. WARREN
Counsel of Record
ROBERT R. GASAWAY
JEFFREY B. CLARK
DARYL JOSEFFER
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Counsel for American Trucking Associations, Inc. and Chamber of Commerce of the United States

BETH L. LAW
ROBERT S. DIGGES
ATA LITIGATION CENTER
2200 Mill Road
Alexandria, VA 22314
Counsel for American Trucking Associations, Inc., Burns Motor Freight, Inc., Garner Trucking, Inc., and Genie Trucking Line, Inc.

GARY H. BAISE
ELIZABETH S. POLINER
BAISE, MILLER & FREER, P.C.
1020 19th Street, N.W.
Suite 400
Washington, D.C. 20036
Counsel for Equipment Manufacturers Institute

DAVID M. FRIEDLAND
BEVERIDGE & DIAMOND
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005
Counsel for National Small Business United, The American Portland Cement Alliance, and The Glouster Company, Inc.

ERIKA Z. JONES
TIMOTHY S. BISHOP
ADAM C. SLOANE
MAYER, BROWN & PLATT
1909 K Street, N.W.
Washington, D.C. 20006
Counsel for American Farm Bureau Federation

ROBERT R. GASAWAY
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
Counsel for American Road and Transportation Builders Association

JAN S. AMUNDSON
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Counsel for National Association of Manufacturers

DIMETRIA G. (JIM) DASKAL
THE DASKAL LAW GROUP
3 Church Circle
Suite 500
Annapolis, MD 21401
Counsel for National Coalition of Petroleum Retailers

DOUGLAS I. GREENHAUS
NATIONAL AUTOMOBILE DEALERS ASSOCIATION
8400 Westpark Drive
McLean, VA 22102
Counsel for National Automobile Dealers Association

JEFFREY L. LEITER
CHET M. THOMPSON
COLLIER, SHANNON, RILL & SCOTT
3050 K Street, N.W., Suite 400
Washington, D.C. 20007
Counsel for Non-Ferrous Founders' Society